was only about 75 per cent efficient and operated mainly on the near back wheel. This not only caused the car to swerve to the right, but also necessitated an appreciable delay. In a second, at 40 miles per hour, the car would travel 60 feet.

5. The steering gear was very loose. The effect of this is that on the wheel being turned the car would not immediately respond. There would be a definite lag.

6. As the oncoming cyclist had actually moved on to the 8 feet grass verge there would have been no accident if the accused had succeeded even in keeping to the road, albeit well to his wrong side. In fact the off wheels of the car went on to the grass verge for a distance of 40 feet.

7. The brakes were never applied at all."

Lastly the President cited from the judgment of Chang Min Tat J. in *Lau Lim Peng* v. *Public Prosecutor*,[8] where the accident occurred in a built-up area, at a bend known to be a dangerous corner (with a sign to that effect advising caution) and the appellant's lorry was going so fast in attempting to overtake the deceased motor-cyclist that he was unable to avoid overturning and running from behind into the innocent motor-cyclist riding on his side of the road at a time when it was not necessary to drive anywhere near him. The judge altered the sentence from a fine of $1,000 to 6 months imprisonment. The facts speak clearly for themselves.

All the above cases were, in my opinion, proper to cite, provided that these appellants had behaved as heinously as Downey and the others. To thus equiparate the appellants with those people not only implied that these appellants deserved more condign punishment, but also a finding of "dangerous driving" indistinguishable from the conduct of those other drivers. In none of the five cases were the relevant facts set out at all. Being classed together for punishment, in total disregard of the facts of each case, it necessarily follows that these appellants had also been denied due and proper consideration of their defences and the different circumstances under which they became involved in their misfortune. In effect their fault was considered as if indistinguishable from Downey's. The doubling and trebling of the maximum sentences passed on Downey and the others is indeed the clearest indication that the degree of fault (if any) shown by these appellants had not only been completely lost sight of, but held to be even more heinous than the kind of driving disclosed in those other cases. In my view such miscarriage of justice must be rectified. I do not think any motorist should be condemned to serve a long stretch in prison unless in the manner of his driving he had shown a culpable and callous disregard for the safety of other road users. Making scapegoats of innocent motorists is anathema to our administration of justice.

I trust therefore that the guidelines laid down by Lawton L.J. in *Regina* v. *Guilfoyle*,[9] which I have recently caused to be circulated to all subordinate courts, will be studied and followed.

*Order accordingly.*

Solicitors: *R. K. Nathan & Co.; Lovelace & Hastings.*

## ARA BINTE AMAN & ORS. v. SUPERINTENDANT OF LANDS AND MINES, 2ND DIVISION

**[A.C.J. (B.T.H. Lee J.) December 17, 1973]**
**[Kuching — Civil Appeal No. 9 of 1972]**

*Native Customary Law — Sarawak — Customary rights over land — No evidence of occupation — No proof of custom — Land a Government reserve — Customary Rights cannot be exercised over it — Difference in Customary Law applicable to 2nd Division from that applicable to 3rd Division — Land Settlement Ordinance, (Sarawak Cap. 28) s. 66 — Land (Classification) Ordinance, 1949, s. 8 — Land Code (Sarawak Cap. 81), s. 10(2) — Lands Ordinance (Cap. 27 — Sarawak Revised Laws 1946), ss. 91(1), 108.*

In this case the appellants appealed against the decision of the District Court, Simanggang, which had dismissed their claim of customary rights over certain lands.

**Held,** dismissing the appeal: (1) on the facts there was no reliable evidence of occupation of the land and the learned magistrate was right in rejecting the claim;

(2) as the land was Government reserve land, no customary rights could be exercised over it.

*Cases referred to:-*

(1) *Nyalong* v. *Superintendant of Lands and Surveys, 2nd Division, Simanggang* [1967] 2 M.L.J. 249.

(2) *Injing* v. *Tuah & Anor.* [1971] 1 M.L.J. 115.

(3) *Sumbang anak Sekan* v. *Engkarang anak Ajah* [1958] S.C.R. 95.

(4) *Maqbul Ahmad* v. *Oukar P.N. Singh* A.I.R. 1935 P.C. 5.

(5) *Newcastle City Council* v. *Royal Newcastle Hospital* [1959] 1 All E.R. 734.

(6) *Keteng bin Haji Li* v. *Tua Kampong Suhaili* [1951] S.C.R. 9.

(7) *Sijip anak Majan* v. *Reg.* [1954] S.C.R. 40.

(8) *Local Government Board* v. *Arlidge* [1915] A.C. 158.

CIVIL APPEAL.

*D. Tajem* for the appellants.

*D. J. Morris* (Legal Adviser, Lands and Surveys Department, Kuching) for the respondent.

**B.T.H. Lee J.:** This is an appeal from a judgment of the District Court, Simanggang, given on the 4th September, 1972.

The appellants (17 in all) alleged that they are claiming customary rights over the land, the subject matter of this appeal.

On behalf of the appellants a number of grounds were raised.

To my mind the main question upon which this appeal turns is simply one of fact.

I do not propose to recapitulate in detail the evidence that was given by all the 17 appellants. But it would be expedient to set out shortly the evidence which bears on the question of customary rights over the land of which they lay claim.

That all the appellants in this case failed to discharge the burden of proof which lay upon them to prove that at the time of Settlement they were entitled to the parcels of land is plain enough.

Their evidence has been proved to be uncorroborated, unconvincing, contradictory, and based partly on hearsay evidence.

In so far as identification of the land is concerned the appellants had no means of identifying the land. Their evidence as it stood seemed vague, unsatisfactory and unreliable.

I will deal first with the evidence of T. R. Marim (PW5) and John Shim (PW19).

T.R. Marim (P.W.5) called in support of Omar's (Appellant No. 4) claim said he was only 13 when the jungle was felled and only visited the land once subsequently i.e. 40 years later. On that occasion he knew it was Omar's land because Omar himself told him so.

John Shim (PW19) merely raised speculations. He said:

"It is impossible to miss customary rights,"

and earlier he said:

"I do not think there was any surrender."

The following witnesses could speak as to matters only by hearsay.

Appellant No. 3 said her father and mother told her about this land i.e. that her father felled the jungle.

Appellant No. 7 said his father felled the jungle on the land. He did not know when. His father told him that he felled.

The evidence of identification of the parcels of land is hardly convincing:

"Witness No. 1 (Appellant No. 1) said in cross-examination she cannot point out the piece of land on the map but she can show the site of the land.

Appellant No. 3 said she visited the land only once when she was 8 years old and then twice when she was 32 years.

The land was not cultivated in the meantime but her husband is able to point out the boundaries to the surveyor.

Appellants No. 6, 10 and 11 did not point out their boundaries to the surveyor at the time of survey, but allowed their neighbours to do it.

T.K. Abu Talip (Appellant No. 17) was supposed to have 'verified' a lot of the boundaries, but in cross-examination it was revealed that he did not actually visit the lands. He admitted he could not actually be sure of the boundaries."

Some of the reasons given in evidence carried little conviction:

"Appellant No. 8 says he regularly farmed this land. He filled in a form claiming this land during the Settlement but omitted to mention this vital fact. When asked in re-examination the reason, he said he forgot i.e. he forgot he had been regularly farming the very piece of land he was claiming.

Appellant No. 9 says he has not farmed the land since the Japanese occupation because he had no title. But this factor did not stop him farming before the Japanese occupation.

Appellants No. 11 and 12 say they often visit the lots they are claiming just to look at them.

Almost all the Appellants say they want to make use of the land, but have not done so for 25 years.

Appellant No. 16 has not used the land he is claiming since 1946 or 1947 because no one has made use of the surrounding land."

It is I consider worth noting that no evidence was adduced to show that the land was allowed to fallow. Quite clearly the appellants had in their evidence offered some other reasons.

Some of the evidence can scarcely be called evidence at all.

"Appellant No. 7 says his father gave him the land. His father told him he felled the jungle. He does not know if his father ever cultivated the land."

The appellants contradict themselves:

"Appellant No. 6 says he applied for this land in 1960 but found it to be a Government reserve.

He later says he was not told it was a Government reserve.

He then said he had no intention of relinquishing his rights, but acknowledges the existence of occupation by others without objection."

The only observation that I would make is why should appellant No. 6 apply for what he claims always belonged to himself:

"Appellant No. 9 said that he did not own any other pieces of land in Simanggang Town. However in cross-examination he admitted he owned other land under title.

Appellant No. 1 in her anxiety to deny knowledge of everything said she was not called to the Government office was not told of the Settlement and did not submit a claim to the land."

However a claim sheet signed by her was produced in evidence by the Settlement Officer. She managed to lodge an appeal against this settlement of which she knew nothing about:

"Similarly Appellant No. 11 did not know of these lands being declared State land, but he managed to lodge an appeal against the Settlement order declaring it to be State land."

It is to be observed that no expert evidence had been adduced to show what if any is the native custom which entitled these claimants to assert their rights to the land.

Of interest is the case of *Nyalong* v. *Superintendent of Lands & Surveys, 2nd Division Simanggang.*[1]

Penghulu Geringau was called in *Nyalong's* case although the testimony of persons likely to know about it would be relevant and admissible under sections 48 and 59 of the Evidence Act, 1950.

It seems the only evidence on record is that of Donald Bhuma, the Settlement Officer, the witness for the respondent (hereinafter referred to as "the Settlement Officer") an Iban from the 2nd Division who is familiar with local adat. His evidence was as follows:

"It is possible to lose rights if they abandon cultivation for more than 10 years."

Indeed, this piece of evidence stands on the record uncontradicted.

It is quite clear from the above evidence that the testimony of the appellants were unreliable and unworthy of credit and the learned Magistrate has accordingly rejected them.

The issue in this case was one of fact and as the trial Magistrate has based his decision on the opinion he formed as to the reliability of the witnesses whom he had seen and heard the appellate court could not interfere, unless the finding of fact is manifestly wrong.

Even assuming that there is some evidence of occupation of customary rights, they have clearly been lost by reason of non-user since the Japanese occupation, non-user having been admitted by the appellants.

I would dismiss the appeal solely on this ground for the reasons which I have stated. Since a number of other points has been canvassed I will briefly express my views about them.

The land according to the Settlement Officer is a Government Reserve — over which all customary rights had been surrendered before they were gazetted. The Gazette of which the court can take judicial notice are:

GN 1338 dated 23.10.1953
1443 dated 6.11.1953
540 dated 20.4.1956
1598 dated 19.10.1956
501 dated 5.4.1957
1768(1) dated 13.12.1957

and were set out in the claim sheets.

Section 10(2) of the Land Code (Cap. 81) provides:

"No person whether a native or a non-native may occupy any Native Customary Land or any *Reserved Land* save under and in accordance with the conditions applicable thereto by virtue of this or any other written law, and any person in occupation thereof shall be deemed to be in unlawful occupation of Crown land...."

The land being Government Reserve, it is abundantly clear that no person can exercise customary rights over it.

There seems to be little doubt that some notice were given inasmuch as five parcels of customary rights were surrendered and one parcel of alienated land was surrendered.

One observation I think it right to make and it is this. That all the time when the Reserve was gazetted, no customary rights existed. The land were still virgin jungle or have already been acquired.

No customary rights could have been acquired because there was no:

(a) fruit trees.

(b) no continuous occupation or buildings.

(c) no burial grounds or shrines and

(d) no right of way.

(See section 66 of Land Settlement Ordinance (Cap. 28)).

Section 66(b) provided that customary rights shall be recognised in respect of land that is in continuous occupation or has been cultivated or built on within three years.

In the case before the court there is no evidence of continuous occupation and in fact no effective occupation at all (as to which I will say something presently).

The Settlement Officer, could not serve any of the claimants notice and pay compensation inasmuch as his investigations revealed the land to be State Land and prior to this they were virgin jungle, and there was no occupation or user for 25 years.

But none of the 17 appellants gave evidence to show that they were allowing the lands to fallow in accordance with a cycle of maximum fertility for the land. Nor at the trial did the court have the benefit of the opinion of an expert in such matters from the appellants.

Reference was made to Secretariat Circular No. 12/1939 on the subject of Native Land Tenure.

I will quote the relevant paragraphs (I am omitting the irrelevant passages):

"1. The Land Orders recognise native customary rights to land but give little guidance on the subject: the law of customary tenure is wrapped up with that of inheritance and neither has yet been adequately codified. It is the aim of Government to record and protect these customary rights and to prevent the various communities from impoverishing themselves by disposing lightly of their rights to others, whether alien or native. The following notes are the first step towards a better appreciation of the position and it is expected of every officer that he will study the subject and assist the Secretary for Native Affairs and the Superintendent of Lands and Surveys by suggestion and constructive criticism.

2. ....

3. All natives of Sarawak follow Indonesian adat to a greater or lesser degree and that adat, as regards the customary tenure of land, is briefly as follows:—

(i) The right to cultivate cleared land vests in the community with priority to the heirs of the original feller of big jungle. This right must be exercised in accordance with a cycle compatible with the preservation of the maximum fertility of the land (and no longer) by methods of cultivation within the reach of the community. The cycle is, in their eyes, not a matter for rule of thumb but for expert native opinion.

(ii)-(iii)....

(iv) No community or individual may hold up land in excess of requirements and, the extreme case, removal to another district automatically extinguishes all rights of user. The old Order (a) dated 10.8.99 is an excellent exposition of this principle."

It seems clear from the case in *Nyalong, supra,* a case in the same Division (of which this is one) namely 2nd Division Simanggang, the court in the course of its judgment said at page 251 paragraph A-C:

"The whole basis of temuda rights by a single family over land appears to me to be based on the fact of the family belonging to the community and on the continuous occupation of that land.... The right which the plaintiff may have created by his original clearing and cultivation, is a restricted one and it can be lost by abandonment."

and at the same page paragraph H:

"Penghulu Geringan who was called as a witness by the Plaintiff said in evidence that abandonment for a period of ten years meant loss of temuda rights on the logical basis that after 10 years the land had reverted to virgin jungle and was therefore whomsoever recleared it."

This evidence incidentally is relied upon as supporting and coincides with the evidence of the Settlement Officer a native of the 2nd Division to the effect that ten years non-user results in loss of rights.

For the appellants, counsel has sought to rely on the case of *Injing* v. *Tuah & Anor.*,[2] which cited the case of *Sumbang anak Sekan* v. *Engkarong ak. Ajah*[3] for the proposition of "reasonable farming distance" from the land. The passage read:

"...if the holder of customary farming rights moves from a particular longhouse but remains within the same Penghulu's jurisdiction, he continues to retain in full such farming rights provided his move does not take him beyond what can only be described as 'reasonable farming distance' from the land. This of course would have to be pure question of fact and naturally in modern times with outboard engines people are often enabled to farm further away from the longhouse than in former days."

The court there referred to Volume 7 of the Laws of Sarawak, Appendix "A" at page 631 which is in these terms:

"A guide to Judges, Magistrates and others on adoption, divorce, the acquisition and disposition of property as practised amongst Sea Dayaks of the Third Division, ratified at the Penghulus' Conference, held at Sibu on 15th July, 1952."

That case seems to me with utmost respect to be applicable to the Third Division only. We are here dealing with a matter concerning the Second Division of Sarawak, Simanggang and accordingly has no application to the determination of the question before this court.

But assuming for a moment that customary rights had not been lost by non-user, the publication of the land as a Government Reserve, in my judgment, effectively terminates them by virtue of section 108 of the Land Ordinance (Cap. 27) which reads:

"108. Any person who shall be found unlawfully occupying and Crown land reserved for a public purpose... shall be guilty of an offence against this Ordinance...."

To challenge the validity of the Government Reserve is in my view too late at this distance of time.

The investigation of the Settlement Officer shows that the appellants had no such interest in the land as would entitle them, and even assuming that they ever had such interest, the claims are now barred in equity by the acquiescence of the appellants and at law by the Public Authorities Ordinance (No. 19/1948) and Items 110-112 of the Schedule to the Limitation Ordinance (Sarawak Cap. 49).

Here I would quote and adopt a passage in the case of *Maqbul Ahmad* v. *Onkar P.N. Singh*,[4] where it was held that there is no general judicial jurisdiction outside the Limitation Act enabling a court to relieve a suitor from the provisions of the Act on the ground of hardship and a court cannot override the provisions of the Limitation Act on equitable considerations.

It may be here pointed out that the procedure as such pursued by the appellants appear to me in the circumstances to be quite inappropriate.

Turning to the question of occupation, there is, in my opinion, no evidence to establish occupation in the present case.

It will I think be useful to refer to what Lord Denning said in *Newcastle City Council* v. *Royal Newcastle Hospital*[5] on the meaning of "occupation":

"'Occupation' is matter of fact and only exists when there is sufficient measure of control to prevent strangers from interferring."

Section 91(1) of the Land Ordinance (Cap. 27) (Revised Edition of the Laws Ordinance, 1946 — Vol. 1) reads:

"Native land reserves may be made in the discretion of the Superintendent by demarcation for the communal use of Malay Kampongs and native houses, and natives may also occupy land individually by customary tenure, in both of which *no ownership of the land shall vest in the natives* and in which only such crops as padi, vegetables, pineapples, sugar-canes, bananas, yams and similar cultures shall be planted. Such reserves shall not be subdivided and shall be occupied free of all charges, and shall be in addition to the native holdings permitted under section 90. Where possible, claims to fruit groves and farming lands shall be registered in the Land Office in each district."

The law on this point is also covered by section 8 of the Land (Classification) Ordinance 1949 (see 1949 Supplement to the Laws of the Colony of Sarawak).

Section 8 reads as follows:

"8(1) No person may occupy any Mixed Zone land or Native Area Land unless a documentary title is still substituting in respect of such land.

(2) No person may occupy any Native Customary Land or Reserved Land except as is provided by or under the law governing such land. Natives who are in lawful occupation of Native Customary Land are licensees of Crown land."

There are however three cases in the books on this point.

The first is the case of *Keteng bin Haji Li* v. *Tua Kampong Suhaili*[6] where Digby J. in the course of his judgment said:

"In Sarawak a person can be said to 'own' land only if there is a Land Office title subsisting in respect of that land. If there is no such title the land is Crown land; the occupier is at best a mere licensee; and he has no legal interest which he can either charge or transfer. That is so whether for the purposes of the Land (Classification) Ordinance the land is Native Customary Land; Reserved Land or Interior Area Land. If a person abandons his legitimate occupation of such land he does so at his peril."

To the same effect is the second case decided three years later in *Sijip anak Majan* v. *Regina*.[7] The headnote reads:

"Persons in lawful occupation of 'jerame' are licensees of Crown Land and hold the land by customary tenure."

In the final case of *Nyalong* v. *The Superintendent of Lands and Surveys, 2nd Division, Simanggang*[1] the court expressed itself thus at page 251:

"The right which the plaintiff may have created by his original clearing and cultivation is a restricted one and it can be lost by abandonment.

It must be remembered that a person can be said to own land only if there is a land office title subsisting in the land and if no such title exists the occupier is a mere licensee of Crown Land."

Presentation of Claims to Crown Land and investigation of claims to Crown Land are set out in sections 93 and 94 of the Land Code (Sarawak Cap. 81):

"93.-(1) All claimants to Crown land in the block shall appear at such time and such place as the Settlement Officer may, by notice under section 88, direct.

(2) Claimants may appear in person, or by advocate, or by any representative approved by the Settlement Officer and shall produce to the Settlement Officer all documents held by them, or under their control, affecting the Crown land which they claim. A claimant who fails to appear may submit to the Settlement Officer a statement of his claim in writing.

94.-(1) The Settlement Officer shall investigate publicly all claims to Crown land, whether based upon documentary evidence, native customary tenure or otherwise, and shall have power to determine in whose favour the rights to such land shall be shown in the Settlement Order made under section 95 or may, in the case of conflicting claims, permit the parties to refer the determination of the same to arbitration under the Arbitration Ordinance."

It was contended on behalf of the appellants that the Settlement Officer had not inquired as he ought to have done. He ought to have given fair opportunity to make representations before he acted as such.

I am of opinion that no judicial duty is laid on the Settlement Officer in the discharge of these statutory

duties, and that the only question is whether he has complied with the statutory directions set out in section 94.

True the Settlement Officer had to inquire, and no doubt he did, in his administrative capacity, but he had not to conduct anything in the nature of a judicial or quasi-judicial inquiry.

On the other hand if it is contended that his duties are quasi-judicial in nature, there was sufficient compliance by the Settlement Officer of the procedure and he gave due notice, the appellants having been given the opportunity to present their claims, which in fact they did.

The material before him did not satisfy him that there was customary rights, a view with which I fully agree.

I can find nothing irregular or unlawful in the proceedings whereof complaint is made by the appellants.

As was said by Lord Shaw of Dunfermline in *Local Government Board* v. *Arlidge*[8] of the authority there concerned it:

"must do its best to act justly and to reach just end and by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means."

It seems to me that the Settlement Officer acted very properly and fairly. No exception can be taken whatever to what he has done.

But where there is a rehearing by way of evidence *de novo* before the District Court in the presence of the appellants or their representatives, I do not think that it lies in the mouth of the appellants to say that there was a denial of natural justice, assuming however in favour of counsel for the appellants that there was defect at the earlier stage. Such defect, if any, has, in my judgment been cured by the later proceedings.

For these reasons I am in full agreement with the Magistrate both in his findings of fact and in his conclusions of law. There is no substance whatever in the other grounds and this appeal fails and is accordingly dismissed with costs.

*Appeal dismissed.*

Solicitors: *Ibrahim & Co.*

## TIONG HIN REALTY SDN. BHD. v. CHAIRMAN, MAJLIS BANDARAN, KUANTAN

**[O.C.J. (Syed Othman J.) February 14, 1974]**
**[Kuantan — Originating Motion No. 6 of 1973]**

*Local Government — Rating — Annual value — Annual rate — Shophouse destroyed by fire — Rebuilding — Principles of valuation — Method of valuation — Comparative method.*

A two storey building whose annual value had been $900 and the annual rate $187 was destroyed by fire in 1966. It was rebuilt in 1970 at the cost of $20,000: the party walls were reinforced and additional party walls were put up and floor areas were increased. It was not in dispute that the premises had been let at a rental of $280 per month for a period of 3 years with an option to renew on the same rental for a further two years. The Majlis Bandaran had assessed the annual value of the property at $6,600 and the annual rate $1,386. On appeal,

**Held:** (1) considering the cost of rebuilding it was difficult to accept that in estimating the gross annual rent it would be said that the appellant should be able to recover this expenditure in about 3 years ($6,600 x 3). By any standard, legal or economic, this figure was too high;

(2) in the circumstances of the case as the real rent was $280 per month the proper annual value of the premises was $3,360.

**[Editorial Note:** An appeal against this decision was lodged by the Majlis Bandaran, but was later withdrawn.]

*Cases referred to:-*

(1) *Overseas Chinese Banking Corporation Ltd.* v. *Commissioner of Federal Capital of Kuala Lumpur* [1963] M.L.J. 294.

(2) *Robinson Brothers (Borneo) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee* [1937] 2 K.B. 445, 468.

ORIGINATING MOTION.

*V. Balendran* for the appellant.

*G. Singham* for the respondent.

**Syed Othman J.:** This appeal is against the decision of the Chairman, Majlis Bandaran, Kuantan in assessing the annual value of shop house No. 39, Jalan Wall, Kuantan at $6,600 and the annual rate at $1,386.

The shop house originally was a two storey building similar to most of those which adjoin it now. Its annual value had been $900 and the annual rate $189, the same as those of the existing adjoining shop houses. On 18th April, 1966 the whole shop house was destroyed by fire. The appellant rebuit the shop house in 1970 at the cost of $20,000: the party walls were reinforced and additional party walls were put up, increasing to 2,200 square feet the floor area of the ground floor and to 1,060 square feet the floor area on the first floor. It is not disputed that the premises have been let at a rental of $280.00 for a period of 3 years with an option to renew the lease on the same rental for a further period of 2 years.

In assessing the annual value of the property, the valuation committee of the Town Council relied on the advice of a valuation officer. It treated the property as new and not subject to the Control of Rent Act. It assessed the annual value at $7,200. The appellant objected to this assessment. On the advice of the valuation officer, it was reduced to $6,600. But the appellant says it is still too high, and hence the appeal.